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## RECENT INSTITUTIONAL LEGISLATION

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The brief period covered by our history as an independent nation has been, for the student of political institutions, an interesting and eventful one. Within it have been crowded changes in political thought that have excited the apprehensions of those who fear, and inspired hope in those who wish for the ultimate triumph of truly popular government. Rightly viewed our entire history as a nation has been a record of active and unceasing conflict between opposing views of government. The real struggle, the one which is fundamental, the one which in importance has overshadowed all others, the one which in this as in other countries has had a determining influence upon the course of political evolution, has been and still is over the question in whose hands shall the power of ultimate control over the State be lodged. This question, though often kept in the background of political discussion and for that reason not sufficiently appreciated by many who have given their attention mainly to the outward and visible phenomena of our political life, is nevertheless the one which, consciously or unconsciously, has been the cause of all important changes made in our governmental institutions.

Notwithstanding the more or less prevalent belief that the one distinguishing feature of the American constitutional system is its recognition of and adaptation to the idea of government by the people, it is nevertheless true that the fear of too much democracy, rather than too little, largely determined the form in which our general government was cast in the beginning. The subsequent development of our political institutions has been due in large measure to the effort to make the constitutional arrangements inherited from our Federalist fathers a more effective means of popular rule. The whole course of later political development in this country may be viewed as the outcome of a movement to evade or break down the checks intended to guard against what the founders regarded as an undue and dangerous extension of the power of the people.

The growth of the party system with its demand that the president should be the choice of those who elected a majority of the electoral college, was a long step away from the principles of the founders. It was an effort to make the government more nearly reflect the will of the qualified voters. This, together with the removal of high property qualifications for office-holding, which in many States excluded all except the well-to-do class of voters from the important offices, indicates a growing belief that the government should really represent and be responsible to the numerical majority of the voters.

We can clearly see two different ideas of democracy underlying our political development. Both have been present in some degree from colonial times down. According to one view, the people should keep the more important matters of political organization and legislation in their own hands, while the other view would favor entrusting this business to representatives responsible to the people. It may be conceded that the latter plan, if carried out in accord with the spirit of real democracy, would satisfy the most exacting advocate of popular government. If the people had effective control over those who manage the public business, there would be little need for that more direct democracy under which the people have the law-making power in their own hands.

In the early years of our history it was the idea of democracy through representation that seems to have dominated the minds of those who set up our State governments. The early constitutions were framed on the theory that legislative power should be exercised by representatives selected for that purpose. The device of a short term of office was relied upon to make the legislative bodies respect the opinions and wishes of the majority of the voters. It was in fact this too direct dependence of the State government upon the will of the majority of the electorate that in the opinion of the conservatives of that time was its chief fault. The reaction against what the federalists regarded as an unwarranted and dangerous concession to the principle of democracy, gave us the Federal Constitution and remodeled the State governments by introducing the system of checks on public opinion. We thus started out at the beginning of our history to bring the State government close to the voters without, however, putting it directly in their hands. Then, fearing that we had gone too far in the direction of establishing the real sovereignty of the majority of the voters, we seized upon and incorporated in our political system various devices for limiting and counteracting the

influence of the majority. The division of authority, less frequent elections, and a more difficult method of removing public officials, together with the greater difficulty of changing the fundamental law itself, greatly lessened governmental responsibility and thus made the opinion of the majority a less direct and positive force. The real struggle has all along been between those who would restrict, and those who would extend the influence of the people upon governmental policies. The result has been a compromise in which we have endeavored to reconcile two views of government, which not only have nothing in common, but are in fact inherently opposed to each other. We have limited the power of the people by one set of changes in our system of government, which has to that extent made it possible for those who formulate and carry out public policies to disregard public opinion. The unceasing conflict between those who would make the majority the ultimate source of authority in all political matters, and those who would effectually curb the power of the majority, is reflected in the varying compromises between these two ideas which may be seen throughout our political history. If we accept the principle that the majority are sovereign, there is no escape from the conclusion that those entrusted with the management of public business should in some effective way be responsible to that majority. To the extent that our system of government has tied the hands of the majority, it has destroyed responsibility and made it possible for the opinion of the minority to prevail in governmental affairs.

Along with the various devices for limiting the power of the majority, we have adopted other devices obviously designed to make the majority supreme. These latter, however, are for the most part a later development—the expression of a larger measure of confidence in the people.

One class or group of these changes seems to have contemplated an approach to democracy through the form of representative government. The effort to perfect the method of voting may be included under this head. The right to vote could be of but little value for purposes of democracy until adequate registration and ballot laws protected the voter against fraud and intimidation. This was soon found, however, to be insufficient. The final choice amounted to little, if the people did not control the selection of candidates from whom the final choice was to be made. Hence the effort to secure the adoption of some direct primary scheme which will make the

selection of a public official an expression of genuine popular choice. It is beginning to be seen, however, that the power to choose is not sufficient, especially in the case of officials elected for long terms, or exercising powers which there is a strong temptation to abuse. In fact responsibility of public officials to the people may be enforced much more readily through the power to remove than the power to elect. Indeed, the multiplicity of elective offices, though apparently a concession to democracy, has largely defeated the purpose of direct election.

It is but natural under these circumstances that the effort to secure responsibility should take the form of a movement to make the tenure of office depend more directly upon the will of the voters. The power to remove being absolutely essential to responsible government, it follows that this power must in some way be exercised by or for the people. The tendency, as seen in some of the newer municipal charters, to give the power to remove public officials directly to the people, is merely the logical outcome of the effort to make our so-called representative government really representative. The movement to bring public officials more directly under the control of the people, is from present indications likely to continue, until all powers exercised through representatives are safeguarded by an effective official responsibility.

There is little reason for believing, however, that the representative principle will be the predominant one in our State and local governments. The constitutional restraints on majority rule, which have so largely defeated the efforts of democracy to attain its ends under our political system, have tended to discredit the representative principle. To escape from the evils of this system, the people have favored a large measure of direct democracy. We see this tendency strongly manifested in the democratic movement which sought to establish popular control over the State governments in the first half of the nineteenth century. This assumed the form first of giving the voters the right to participate in the making of the fundamental law of the States. The recognition of the people as part of the constitution-making machinery was not designed to give them more than a mere negative of proposed changes in constitutional law. The control of the State governments, which had been in the hands of the numerical majority of the legislature during the Revolutionary period, was greatly limited by the introduction of the system of checks and balances during the subsequent period when federalist

ideas of government dominated American politics. The principle of limiting the power of the majority had already been incorporated in our political institutions, before the movement to give the people a voice in the enactment of constitutional law became general. Thus in the beginning, this movement to refer constitutional law to the people did not involve any recognition of the idea that the majority of the people are the source of all authority in the State. The right to propose changes in the Constitution was the prerogative of a representative body, and the power of the voters consisted in their right to accept or reject proposals thus submitted to them—proposals which had already been approved by some extraordinary majority in a representative body, or for the ratification of which, perhaps, an extraordinary majority of the voters was required.

The progress of democracy has had some effect in minimizing these restrictions on majority rule. Despite the difficulties which the federalist distrust of government directly responsible to the people, placed in the way of popular control, the force of public opinion has made important inroads upon the system of checks. The enactment of constitutional law has in some States been brought more nearly into harmony with the idea which, since the extension of the suffrage, has come to be more or less widely accepted—that the majority of the voters are the final authority in the State. This is seen in the gradual removal of excessive restrictions upon the exercise of the constitution-making power, the concurrence of a majority in the legislature and a majority of the voters, in some cases, being all that is required. Where this stage is reached in the development of our constitutional law, the people have full negative power as against their legislatures and constitutional conventions. This negative applies, however, only to the constitution as it leaves the hands of the representative body which has framed it. Its content is under our system of government a matter to be subsequently determined by the courts, and with reference to the interpretation thus placed upon it, the veto power of the people does not apply. The most that we can say, then, is that the popular veto in this form is limited to the preliminary stage of constitution-making, and can not be employed to prevent innovations due to judicial construction.

Moreover, it often happens under our system of checks that constitutional provisions which have been submitted to and ratified by the voters, are inoperative for the reason that the legislature neglects or refuses to enact laws needed to make them effective.

In working out the policy of direct participation of the people in law-making, we have tried to harmonize it with the system of checks upon which it was grafted. And as the distinctive feature of our system of checks is the restraints imposed upon the majority, our referendum, as a means of ascertaining the popular will, has not infrequently refused to recognize the numerical majority. Thus where the people concur, it may not be the will of a simple majority, but a majority of three-fifths or two-thirds that is required. This is often true with reference to the more important matters upon which the people are consulted.

The tendency toward direct legislation has been more or less pronounced ever since the suffrage was extended in the various States. The effort to give the people more influence over legislation was largely forced into this channel through the constitutional checks which prevented the free growth and development of a truly representative democracy. Being unable to exercise any effective control over their representatives, the people were compelled by force of circumstances to turn to direct democracy as the only means of attaining their ends.

There is scarcely room for doubt that in remodeling the State constitutions in imitation of the Federal Constitution, no provision would have been made for direct popular participation in law-making, had it not been for the influence exerted upon them by the growing belief in democracy. This new force made itself felt upon the legislatures, which began to show a disposition to allow the people to decide by a vote at the polls whether certain proposed laws should be enacted. This effort of the legislature to let the people have a voice in the making of laws was met by the courts with the doctrine that legislative powers could not be delegated. To overcome the opposition of the courts it was necessary to modify the constitutions by reserving to the people the right to exercise this power.

Popular government, as the term is now understood, implies more than the mere right of the people to give or withhold their assent to changes in the constitution or the laws. The referendum, or the submission of constitutions and laws to the voters for their approval or disapproval, merely gives the people, to the extent that this practice prevails, a veto on the actions of their representatives. More than this is needed to make the policy of the State reflect the will of the people. Some power should be within the reach of the voters by which they can force their will upon unwilling and more or less irre-

sponsible representatives. One way of securing this is by placing the power to initiate constitutional and other legislation directly in their hands. When this is done, public opinion becomes a force which must be recognized and obeyed by public officials. And since it is on account of constitutional obstacles that democracy has been unable to make purely representative institutions serve its purpose, we must expect to see the direct intervention of the people, through the initiative and the referendum, more generally resorted to as a means of overthrowing minority rule in our State and municipal governments.

No one who is familiar with the history and working of our political institutions, could claim that they are in harmony with the ideas of government now generally accepted. The progress which democracy has made throughout the western world during the last century has changed our point of view with reference to political questions. The fear of popular rule and the desire to subordinate public opinion to the opinion of the minority, which so largely determined the form originally given to our political arrangements, have, with the extension of the suffrage and the growth of democracy, been largely superseded by the belief that the undoubted will of the majority of the voters ought to be regarded as the ultimate source of authority in the State. That our constitutional system, designed to tie the hands of democracy, has not encountered more serious opposition, must be attributed to the fact that the people generally have not been able to trace the evils of our so-called democracy to their true source—the constitutional checks which have had the effect of giving the minority a really controlling voice in political matters. It is, however, coming to be quite generally understood that the majority of the people are often powerless, under our system, to compel or prevent the enactment of laws. As soon as the people become fully conscious of this fact, and moreover realize that it is but the logical result of the constitutional checks on the majority, it is to be expected that they will favor any changes in the system which will give them more control over the government.

The recent tendency in municipal government is at least significant. The so-called commission system of city government is, in fact, a natural and indeed necessary change in the governmental organization of our cities. It is an attempt to simplify the cumbrous and unwieldy machinery of municipal government, to eliminate the whole antiquated system of divided powers, and substitute therefor a single



governing body directly responsible to the majority of the voters. This is merely going back to the principle which we discarded under the influence of the federalist reaction against popular government. Our early State constitutions, framed on the theory of centralizing power in the legislature and making that body in some measure responsible to the voters, were soon superseded by the system of checks on the majority, and now after a trial of this system extending over a period of more than a century, we are beginning to realize that good government is not furthered by limiting the power of the people, but by removing the checks which have heretofore prevented them from exercising effective control over governmental affairs. Government in obedience to public opinion may not be perfect, nor is any intelligent person likely to claim this merit for it, but it is certainly less liable to be corrupt and intolerably selfish than any in which it is possible for those who manage the public business to disregard the will of the majority. Any solution of our present political problems which harmonizes with modern thought, must recognize the real sovereignty of the people; and this means, if it means anything at all, that the will of the majority of the voters is the ultimate source of authority. This is already accepted in all democratic countries except our own. It is quite generally taken for granted that this is the distinguishing feature of our own governmental system, although this view has little foundation in fact.

We must sooner or later choose between two ideas of sovereignty. We must either recognize the majority as ultimately supreme and make our political organization conform to this view; or abandon this idea and admit the right of some other authority to impose its will upon the majority. To limit the power of the majority, as has been the American practice, is in effect to give the minority a controlling voice in many matters of vital importance. It is the growing recognition of this fact that accounts for the movement to make the majority supreme, either through effective official responsibility, or through the initiative and the referendum.

It is coming to be understood that our complicated system of checks makes it extremely difficult to secure any effective expression or enforcement of public opinion in relation to governmental matters. In view of this it is perfectly natural that the people should manifest a determination to take the molding of legislation more largely into their own hands.

It is not likely that any such changes as those which contemplate

the transfer of political power to the majority of the voters, can long be successfully opposed on the ground of unconstitutionality. Such a movement may, it is true, be temporarily retarded by obstacles of this sort, but when an intelligent public opinion in favor of these reforms is thoroughly crystallized, it is reasonably certain that opposition will have to yield. The people will have little patience with minority control when they come to recognize it as such. The misconception of our system of government, which has been and still is so widely prevalent, must be ascribed in large measure to our political literature. The checks designed to limit the influence of public opinion have usually been discussed as if they were originally intended as a means of making the power of the people supreme. Indeed the right of the minority to veto the will of the majority has never been expressly recognized in our political literature, though it is the very essence of the American scheme of constitutional checks. In working out the interpretation of our constitutional system, we have tried to harmonize it with the idea of popular sovereignty. Thus the Constitution, though even at the time of its adoption in no true sense the expression of the will of the people, has by a sort of legal fiction been treated as the highest and most authoritative expression of public opinion in matters political—an embodiment of the ideas and aims of the people with reference to government, binding upon the people themselves until modified in the manner provided for in this original declaration of the so-called popular will. It suited the purposes of the federalists, and of all who wished to limit the influence of public opinion on legislation, to regard this original indirect expression of the will of the people, as more authoritative than any subsequent expression more directly made in the ordinary course of legislation. It also fitted in with their purpose to hand over to that organ of government most remote from the people, and consequently least influenced by the public opinion of the time, the power to interpret this original expression of the popular will, and to overrule any subsequent and more direct expression of the will of the people which it might regard as in conflict with it. The evident purpose of this arrangement was to curb the influence of present public opinion, though this reason has not been much discussed in our literature on government. The question which believers in democracy are beginning to ask, and to which they may demand a satisfactory answer in the future, is why a non-elective lifeholding body is a more trustworthy interpreter of the will of the people than the people themselves, or the organs of

government that more directly represent them. This method of ascertaining the so-called will of the people can not be reconciled with the idea of popular sovereignty as it is now accepted. But while the effect of our constitutional system, and indeed its underlying purpose, has been to deny the real sovereignty of the people, we have tried to give it an interpretation that would make it acceptable to the believers in democracy. This accounts for the fact that so many who believe in the real sovereignty of the people, have at the same time accepted our scheme of checks as a device for safeguarding the expression of the popular will.

This effort to reconcile our governmental system with the fundamentals of democracy, has laid the foundation for a more liberal interpretation of our political scheme. The outward acceptance of democracy by those who defend our constitutional system, makes it increasingly difficult to enforce any checks on public opinion, which have come to be recognized as such. The growing belief in popular government, and the admission even by conservatives that the will of the people is the final authority under our system of government, warrant the conclusion that the people will be impatient of any constitutional device which they come to recognize as constantly thwarting their will. Constitutional arrangements which refuse to yield to the pressure of an enlightened public opinion can not long survive. To insist on a narrow or obsolete interpretation of the Constitution, would be almost certain to direct attention to the system of checks, and in the end lead to a sweeping modification of our political arrangements. It is for this reason not likely that the courts will deal with measures designed to bring the government more directly under the control of the people as they would have done earlier in our history, when the belief in democracy was a less definite and aggressive force.

There can be little room for doubt, however, that the initiative and the referendum, recognizing as it does the right of the people to formulate and give authoritative expression to their will without the intervention of a representative body, is not in harmony with our constitutional system as it was understood by those who originally established it. But far more important is the fact that it is calculated to give effect to what the people want, and for this reason is in accord with the alleged and generally accepted, if not real, purpose of our constitutional system.

The general adoption of such a measure and the acquiescence in its constitutionality, would change fundamentally the character of

our political system by conferring the real sovereignty upon the people. But inasmuch as the people are already supposed to be sovereign, the change is one which would do no violence to our generally accepted political ideas. According to the popular view of the matter, it would merely make the practice of our system harmonize with its theory.

The most important check on the people—in fact the one upon which all others depend—is the difficulty of amending our constitutions. If this one check were broken down, the majority would become supreme, since they would be able to make any changes in the system that might be needed to insure the enforcement of their will. That this is not improbable, recent tendencies in our constitutional development seem to indicate. The use made of the initiative and the referendum for the purpose of amending State constitutions is to say the least significant. If this policy should be generally adopted, our State constitutions would cease to be a check upon the people and become instead a check upon their representatives. If the majority should thus acquire the power to enact constitutional legislation, it is evident that no branch of the State government could thwart public opinion. Even the judicial veto would fall into disuse as against laws made by the people, since no satisfactory reason could be given for the exercise of this power when the people are the real source of both constitutional and ordinary legislation. The initiative and the referendum would thus make the people supreme.